

## CHAPTER 7

# The Law of Neutrality

### 7.1 INTRODUCTION

The law of neutrality defines the legal relationship between nations engaged in an armed conflict (belligerents) and nations not taking part in such hostilities (neutrals). The law of neutrality serves to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce.

Developed at a time when nations customarily issued declarations of war before engaging in hostilities, the law of neutrality contemplated that the transition between war and peace would be clear and unambiguous. With the advent of international efforts to abolish "war," coupled with the proliferation of collective security arrangements and the extension of the spectrum of warfare to include insurgencies and counterinsurgencies, armed conflict is now seldom accompanied by formal declarations of war. Consequently, it has become increasingly difficult to determine with precision the point in time when hostilities have become a "war" and to distinguish belligerent nations from neutrals. Notwithstanding these uncertainties, the law of neutrality continues to serve an important role in containing the spread of hostilities, in regulating the conduct of belligerents with respect to nations not participating in the conflict, in regulating the conduct of neutrals with respect to belligerents, and in reducing the harmful effects of such hostilities on international commerce.

For purposes of this publication, a belligerent nation is defined as a nation engaged in an international armed conflict, whether or not a formal declaration of war has been issued. Conversely, a neutral nation is defined as a nation that has proclaimed its neutrality or has otherwise assumed neutral status with respect to an ongoing conflict.

### 7.2 NEUTRAL STATUS

Customary international law contemplates that all nations have the option to refrain from participation in

an armed conflict by declaring or otherwise assuming neutral status. The law of armed conflict reciprocally imposes duties and confers rights upon neutral nations and upon belligerents. The principal right of the neutral nation is that of inviolability; its principal duties are those of abstention and impartiality. Conversely, it is the duty of a belligerent to respect the former and its right to insist upon the latter. This customary law has, to some extent, been modified by the United Nations Charter (see paragraph 7.2.1).

Neutral status, once established, remains in effect unless and until the neutral nation abandons its neutral stance and enters into the conflict.

**7.2.1 Neutrality Under the Charter of the United Nations.** The Charter of the United Nations imposes upon its members the obligation to settle international disputes by peaceful means and to refrain from the threat or use of force in their international relations. In the event of a threat to or breach of the peace or act of aggression, the Security Council is empowered to take enforcement action on behalf of all member nations, including the use of force, in order to maintain or restore international peace and security. When called upon by the Security Council to do so, member nations are obligated to provide assistance to the United Nations, or a nation or coalition of nations implementing a Security Council enforcement action, in any action it takes and to refrain from aiding any nation against whom such action is directed. Consequently, member nations may be obliged to support a United Nations action with elements of their armed forces, a result incompatible with the abstention requirement of neutral status. Similarly, a member nation may be called upon to provide assistance to the United Nations in an enforcement action not involving its armed forces and thereby assume a partisan posture inconsistent with the impartiality required by the traditional law of neutrality. Should the Security Council determine not to institute an enforcement action, each United Nations member remains free to assert neutral status.

**7.2.2 Neutrality Under Regional and Collective Self-Defense Arrangements.** The obligation in the United Nations Charter for member nations to refrain from the threat or use of force against the territorial integrity or political independence of any state is qualified by the right of individual and collective self-defense, which member nations may exercise until such time as the Security Council has taken measures necessary to restore international peace and security. This inherent right of self-defense may be implemented individually, collectively or on an ad hoc basis, or through formalized regional and collective security arrangements. The possibility of asserting and maintaining neutral status under such arrangements depends upon the extent to which the parties are obligated to provide assistance in a regional action, or in the case of collective self-defense, to come to the aid of a victim of an armed attack. The practical effect of such treaties may be to transform the right of the parties to assist one of their number under attack into a duty to do so. This duty may assume a variety of forms ranging from economic assistance to the commitment of armed forces.

### 7.3 NEUTRAL TERRITORY

As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited. A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side. If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may take such acts as are necessary in neutral territory to counter the activities of enemy forces, including warships and military aircraft, making unlawful use of that territory. Belligerents are also authorized to act in self-defense when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.

**7.3.1 Neutral Lands.** Belligerents are forbidden to move troops or war materials and supplies across neutral land territory. Neutral nations may be required to mobilize sufficient armed forces to ensure fulfillment of their responsibility to prevent belligerent forces from crossing neutral borders. Belligerent troops that enter neutral territory must be disarmed and interned until the end of the armed conflict.

A neutral may authorize passage through its territory of wounded and sick belonging to the armed forces of either side on condition that the vehicles transporting them carry neither combatants nor materials of war. If passage of sick and wounded is permitted, the neutral nation assumes responsibility

for providing for their safety and control. Prisoners of war that have escaped their captors and made their way to neutral territory may be either repatriated or left at liberty in the neutral nation, but must not be allowed to take part in belligerent activities while there.

**7.3.2 Neutral Ports and Roadsteads.** Although neutral nations may, on a nondiscriminatory basis, close their ports and roadsteads to belligerents, they are not obliged to do so. In any event, Hague Convention XIII requires that a 24-hour grace period in which to depart must be provided to belligerent warships located in neutral ports or roadsteads at the outbreak of armed conflict. Thereafter, belligerent warships may visit only those neutral ports and roadsteads that the neutral nation may choose to open to them for that purpose. Belligerent vessels, including warships, retain a right of entry in distress whether caused by force majeure or damage resulting from enemy action.

**7.3.2.1 Limitations on Stay and Departure.** In the absence of special provisions to the contrary in the laws or regulations of the neutral nation, belligerent warships are forbidden to remain in a neutral port or roadstead in excess of 24 hours. This restriction does not apply to belligerent warships devoted exclusively to humanitarian, religious, or nonmilitary scientific purposes. (Warships engaged in the collection of scientific data of potential military application are not exempt.) Belligerent warships may be permitted by a neutral nation to extend their stay in neutral ports and roadsteads on account of stress of weather or damage involving seaworthiness. It is the duty of the neutral nation to intern a belligerent warship, together with its officers and crew, that will not or cannot depart a neutral port or roadstead where it is not entitled to remain.

Unless the neutral nation has adopted laws or regulations to the contrary, no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at any one time. When warships of opposing belligerent nations are present in a neutral port or roadstead at the same time, not less than 24 hours must elapse between the departure of the respective enemy vessels. The order of departure is determined by the order of arrival unless an extension of stay has been granted. A belligerent warship may not leave a neutral port or roadstead less than 24 hours after the departure of a merchant ship of its adversary (Hague XIII, art. 16(3)).

**7.3.2.2 War Materials, Supplies, Communications, and Repairs.** Belligerent warships may not make use of neutral ports or roadsteads to replenish or increase their supplies of war materials or their armaments, or to erect or employ any apparatus for communicating

with belligerent forces. Although they may take on food and fuel, the law is unsettled as to the quantities that may be allowed. In practice, it has been left to the neutral nation to determine the conditions for the replenishment and refueling of belligerent warships, subject to the principle of nondiscrimination among belligerents and the prohibition against the use of neutral territory as a base of operations.

Belligerent warships may carry out such repairs in neutral ports and roadsteads as are absolutely necessary to render them seaworthy. The law is unsettled as to whether repair of battle damage, even for seaworthiness purposes, is permitted under this doctrine. In any event, belligerent warships may not add to or repair weapons systems or enhance any other aspect of their war fighting capability. It is the duty of the neutral nation to decide what repairs are necessary to restore seaworthiness and to insist that they be accomplished with the least possible delay.

**7.3.2.3 Prizes.** A prize (i.e., a captured neutral or enemy merchant ship) may only be brought into a neutral port or roadstead because of unseaworthiness, stress of weather, or want of fuel or provisions, and must leave as soon as such circumstances are overcome or cease to prevail. It is the duty of the neutral nation to release a prize, together with its officers and crew, and to intern the offending belligerent's prize master and prize crew, whenever a prize is unlawfully brought into a neutral port or roadstead or, having entered lawfully, fails to depart as soon as the circumstances which justified its entry no longer pertain.

**7.3.3 Neutral Internal Waters.** Neutral internal waters encompass those waters of a neutral nation that are landward of the baseline from which the territorial sea is measured, or, in the case of archipelagic states, within the closing lines drawn for the delimitation of such waters. The rules governing neutral ports and roadsteads apply as well to neutral internal waters.

**7.3.4 Neutral Territorial Seas.** Neutral territorial seas, like neutral territory generally, must not be used by belligerent forces either as a sanctuary from their enemies or as a base of operations. Belligerents are obliged to refrain from all acts of hostility in neutral territorial seas except those necessitated by self-defense or undertaken as self-help enforcement actions against enemy forces that are in violation of the neutral status of those waters when the neutral nation cannot or will not enforce their inviolability.

A neutral nation may, on a nondiscriminatory basis, suspend passage of belligerent warships and prizes through its territorial seas, except in international

straits. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international straits or as necessitated by distress. A neutral nation may, however, allow the "mere passage" of belligerent warships and prizes through its territorial seas. While in neutral territorial seas, a belligerent warship must also refrain from adding to or repairing its armaments or replenishing its war materials. Although the general practice has been to close neutral territorial seas to belligerent submarines, a neutral nation may elect to allow passage of submarines. Neutral nations customarily authorize passage through their territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.

**7.3.4.1 The 12-Nautical Mile Territorial Sea.** When the law of neutrality was codified in the Hague Conventions of 1907, the 3-nautical mile territorial sea was the accepted norm, aviation was in its infancy, and the submarine had not yet proven itself as a significant weapons platform. The rules of neutrality applicable to the territorial sea were designed primarily to regulate the conduct of surface warships in a narrow band of water off neutral coasts. The 1982 Law of the Sea Convention provides that coastal nations may lawfully extend the breadth of claimed territorial seas to 12 nautical miles. The U.S. claims a 12-nautical mile territorial sea and recognizes the right of all coastal nations to do likewise.

In the context of a universally recognized 3-nautical mile territorial sea, the rights and duties of neutrals and belligerents in neutral territorial seas were balanced and equitable. Although extension of the breadth of the territorial sea from 3 to 12 nautical miles removes over 3,000,000 square miles of ocean from the arena in which belligerent forces may conduct offensive combat operations and significantly complicates neutral nation enforcement of the inviolability of its neutral waters, the 12-nautical mile territorial sea is not, in and of itself, incompatible with the law of neutrality. Belligerents continue to be obliged to refrain from acts of hostility in neutral waters and remain forbidden to use the territorial sea of a neutral nation as a place of sanctuary from their enemies or as a base of operations. Should belligerent forces violate the neutrality of those waters and the neutral nation demonstrate an inability or unwillingness to detect and expel the offender, the other belligerent retains the right to undertake such self-help enforcement actions as are necessary to assure compliance by his adversary and the neutral nation with the law of neutrality.

**7.3.5 Neutral International Straits.** Customary international law as reflected in the 1982 Law of the Sea Convention provides that belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral nation, and must otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerent forces may not use neutral straits as a place of sanctuary nor as a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters. (Note: The Turkish Straits are governed by special rules articulated in the Montreux Convention of 1936, which limit the number and types of warships which may use the Straits, both in times of peace and during armed conflict.)

**7.3.6 Neutral Archipelagic Waters.** The United States recognizes the right of qualifying island nations to establish archipelagic baselines enclosing archipelagic waters, provided the baselines are drawn in conformity with the 1982 LOS Convention. The balance of neutral and belligerent rights and duties with respect to neutral waters, is, however, at its most difficult in the context of archipelagic waters.

Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations. Belligerent ships or aircraft, including submarines, surface warships, and military aircraft, retain the right of unimpeded archipelagic sea lanes passage through, over, and under neutral archipelagic sea lanes. Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and are consistent with their security, including formation steaming and the launching and recovery of aircraft. Visit and search is not authorized in neutral archipelagic waters.

A neutral nation may close its archipelagic waters (other than archipelagic sea lanes whether designated or those routes normally used for international navigation or overflight) to the passage of belligerent ships but it is not obliged to do so. The neutral archipelagic

nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected. If a neutral nation is unable or unwilling effectively to detect and expel belligerent forces unlawfully present in its archipelagic waters, the opposing belligerent may undertake such self-help enforcement actions as may be necessary to terminate the violation of neutrality. Such self-help enforcement may include surface, subsurface, and air penetration of archipelagic waters and airspace and the use of proportional force as necessary.

**7.3.7 Neutral Airspace.** Neutral territory extends to the airspace over a neutral nation's lands, internal waters, archipelagic waters (if any), and territorial sea. Belligerent military aircraft are forbidden to enter neutral airspace with the following exceptions:

1. The airspace above neutral international straits and archipelagic sea lanes remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit or archipelagic sea lanes passage. Such passage must be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Belligerent aircraft must refrain from acts of hostility while in transit but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.
2. Medical aircraft may, with prior notice, overfly neutral territory, may land therein in case of necessity, and may use neutral airfield facilities as ports of call, subject to such restrictions and regulations as the neutral nation may see fit to apply equally to all belligerents.
3. Belligerent aircraft in evident distress may be permitted to enter neutral airspace and to land in neutral territory under such safeguards as the neutral nation may wish to impose. The neutral nation must require such aircraft to land and must intern both aircraft and crew.

**7.3.7.1 Neutral Duties in Neutral Airspace.** Neutral nations have an affirmative duty to prevent violation of neutral airspace by belligerent military aircraft, to compel offending aircraft to land, and to intern both aircraft and crew. Should a neutral nation be unable or unwilling to prevent the unlawful entry or use of its airspace by belligerent military aircraft, belligerent forces of the other side may undertake such self-help enforcement measures as the circumstances may require.

## 7.4 NEUTRAL COMMERCE

A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. For purposes of this publication, neutral commerce comprises all commerce between one neutral nation and another not involving materials of war or armaments destined for a belligerent nation, and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise contribute to the belligerent's war-fighting/war-sustaining capability. Neutral merchant vessels and nonpublic civil aircraft engaged in legitimate neutral commerce are subject to visit and search, but may not be captured or destroyed by belligerent forces.

The law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations; however, a neutral government cannot itself supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. Although a neutral may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so. In effect, the law establishes a balance-of-interests test to protect neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.

**7.4.1 Contraband.** Contraband consists of goods which are destined for the enemy of a belligerent and which may be susceptible to use in armed conflict. Traditionally, contraband had been divided into two categories: absolute and conditional. Absolute contraband consisted of goods whose character made it obvious that they were destined for use in armed conflict, such as munitions, weapons, uniforms, and the like. Conditional contraband were goods equally susceptible to either peaceful or warlike purposes, such as foodstuffs, construction materials, and fuel. Belligerents often declared contraband lists at the initiation of hostilities to notify neutral nations of the type of goods considered to be absolute or conditional contraband as well as those not considered to be contraband at all, i.e., exempt or "free goods." The precise nature of a belligerent's contraband list varied according to the circumstances of the conflict.

The practice of belligerents since 1939 has collapsed the traditional distinction between absolute and conditional contraband. Because of the involvement of virtually the entire population in support of the war effort, the belligerents of both sides during the Second World War tended to exercise governmental control

over all imports. Consequently, it became increasingly difficult to draw a meaningful distinction between goods destined for an enemy government and its armed forces and goods destined for consumption by the civilian populace. As a result, belligerents treated all imports directly or indirectly sustaining the war effort as contraband without making a distinction between absolute and conditional contraband. To the extent that international law may continue to require publication of contraband lists, recent practice indicates that the requirement may be satisfied by a listing of exempt goods.

**7.4.1.1 Enemy Destination.** Contraband goods are liable to capture at any place beyond neutral territory, if their destination is the territory belonging to or occupied by the enemy. It is immaterial whether the carriage of contraband is direct, involves transshipment, or requires overland transport. When contraband is involved, a destination of enemy owned or occupied territory may be presumed when:

1. The neutral vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented
2. The goods are documented to a neutral port serving as a port of transit to an enemy, even though they are consigned to a neutral
3. The goods are consigned "to order" or to an unnamed consignee, but are destined for a neutral nation in the vicinity of enemy territory.

These presumptions of enemy destination of contraband render the offending cargo liable to seizure by a belligerent from the time the neutral merchant vessel leaves its home or other neutral territory until it arrives again in neutral territory. Although conditional contraband is also liable to capture if ultimately destined for the use of an enemy government or its armed forces, enemy destination of conditional contraband must be factually established and cannot be presumed.

**7.4.1.2 Exemptions to Contraband.** Certain goods are exempt from capture as contraband even though destined for enemy territory. Among them are:

1. Exempt or "free goods"
2. Articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease

3. Medical and hospital stores, religious objects, clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes
4. Items destined for prisoners of war, including individual parcels and collective relief shipments containing food, clothing, medical supplies, religious objects, and educational, cultural, and athletic articles
5. Goods otherwise specifically exempted from capture by international convention or by special arrangement between belligerents.

It is customary for neutral nations to provide belligerents of both sides with information regarding the nature, timing, and route of shipments of goods constituting exceptions to contraband and to obtain approval for their safe conduct and entry into belligerent owned or occupied territory.

**7.4.2 Certificate of Noncontraband Carriage.** A certificate of noncontraband carriage is a document issued by a belligerent consular or other designated official to a neutral vessel (navicert) or neutral aircraft (aircert) certifying that the cargo being carried has been examined, usually at the initial place of departure, and has been found to be free of contraband. The purpose of such a navicert or aircert is to facilitate belligerent control of contraband goods with minimal interference and delay of neutral commerce. The certificate is not a guarantee that the vessel or aircraft will not be subject to visit and search or that cargo will not be seized. (Changed circumstances, such as a change in status of the neutral vessel, between the time of issuance of the certificate and the time of interception at sea may cause it to be invalidated.) Conversely, absence of a navicert or aircert is not, in itself, a valid ground for seizure of cargo. Navicerts and aircerts issued by one belligerent have no effect on the visit and search rights of a belligerent of the opposing side. The acceptance of a navicert or aircert by a neutral ship or aircraft does not constitute "unneutral service".

## 7.5 ACQUIRING ENEMY CHARACTER

All vessels operating under an enemy flag, and all aircraft bearing enemy markings, possess enemy character. However, the fact that a merchant ship flies a

neutral flag, or that an aircraft bears neutral markings, does not necessarily establish neutral character. Any merchant vessel or civilian aircraft owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral markings. Vessels and aircraft acquiring enemy character may be treated by an opposing belligerent as if they are in fact enemy vessels and aircraft. (Paragraphs 8.2.1 and 8.2.2 set forth the actions that may be taken against enemy vessels and aircraft.)

**7.5.1 Acquiring the Character of an Enemy Warship or Military Aircraft.** Neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy warships and military aircraft when engaged in either of the following acts:

1. Taking a direct part in the hostilities on the side of the enemy
2. Acting in any capacity as a naval or military auxiliary to the enemy's armed forces.

(Paragraph 8.2.1 describes the actions that may be taken against enemy warships and military aircraft.)

**7.5.2 Acquiring the Character of an Enemy Merchant Vessel or Civil Aircraft.** Neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy merchant vessels or civil aircraft when engaged in either of the following acts:

1. Operating directly under enemy control, orders, charter, employment, or direction
2. Resisting an attempt to establish identity, including visit and search.

(Paragraph 8.2.2 describes the actions that may be taken against enemy merchant ships and civil aircraft.)

## 7.6 VISIT AND SEARCH

Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband or exempt "free goods") of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict. Warships are not subject to visit and search. The prohibition against visit and search in neutral territory extends to international straits overlapped by

neutral territorial seas and archipelagic sea lanes. Neutral vessels engaged in government noncommercial service may not be subjected to visit and search. Neutral merchant vessels under convoy of neutral warships of the same nationality are also exempt from visit and search, although the convoy commander may be required to provide in writing to the commanding officer of an intercepting belligerent warship information as to the character of the vessels and of their cargoes which could otherwise be obtained by visit and search. Should it be determined by the convoy commander that a vessel under his charge possesses enemy character or carries contraband cargo, he is obliged to withdraw his protection of the offending vessel, making it liable to visit and search, and possible capture, by the belligerent warship.

**7.6.1 Procedure for Visit and Search.** In the absence of specific rules of engagement or other special instructions issued by the operational chain of command during a period of armed conflict, the following procedure should be carried out by U.S. warships exercising the belligerent right of visit and search:

1. Visit and search should be exercised with all possible tact and consideration.
2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal (SN or SQ), or by other recognized means. The summoned vessel, if a neutral merchant ship, is bound to stop, lie to, display her colors, and not resist. (If the summoned vessel is an enemy ship, it is not so bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction.)
3. If the summoned vessel takes flight, she may be pursued and brought to by forcible measures if necessary.
4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and boat crew may be armed at the discretion of the commanding officer.
5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning, or another, U.S. warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely con-

ducted. The neutral vessel is not obliged to lower her flag (she has not been captured) but must proceed according to the orders of the escorting warship or aircraft.

6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. Papers to be examined will ordinarily include a certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or manifests of cargo, bills of lading, and on occasion, a consular declaration or other certificate of noncontraband carriage certifying the innocence of the cargo.
7. Regularity of papers and evidence of innocence of cargo, employment, or destination furnished by them are not necessarily conclusive, and, should doubt exist, the ship's company may be questioned and the ship and cargo searched.
8. Unless military security prohibits, the boarding officer will record the facts concerning the visit and search in the logbook of the visited ship, including the date and position of the interception. The entry should be authenticated by the signature and rank of the boarding officer, but neither the name of the visiting warship nor the identity of her commanding officer should be disclosed.

**7.6.2 Visit and Search by Military Aircraft.** Although there is a right of visit and search by military aircraft, there is no established international practice as to how that right is to be exercised. Ordinarily, visit and search of a vessel by an aircraft is accomplished by directing and escorting the vessel to the vicinity of a belligerent warship, which will carry out the visit and search, or to a belligerent port. Visit and search of an aircraft by an aircraft may be accomplished by directing the aircraft to proceed under escort to the nearest convenient belligerent landing area.

## **7.7 BLOCKADE**

**7.7.1 General.** Blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation. A belligerent's purpose in establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. While the belligerent right of visit and search is

designed to interdict the flow of contraband goods, the belligerent right of blockade is intended to prevent vessels and aircraft, regardless of their cargo, from crossing an established and publicized cordon separating the enemy from international waters and/or airspace.

**7.7.2 Traditional Rules.** In order to be valid under the traditional rules of international law, a blockade must conform to the following criteria.

**7.7.2.1 Establishment.** A blockade must be established by the government of the belligerent nation. This is usually accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of his government. The declaration should include, as a minimum, the date the blockade is to begin, its geographic limits, and the grace period granted neutral vessels and aircraft to leave the area to be blockaded.

**7.7.2.2 Notification.** It is customary for the belligerent nation establishing the blockade to notify all affected nations of its imposition. Because knowledge of the existence of a blockade is an essential element of the offenses of breach and attempted breach of blockade (see paragraph 7.7.4), neutral vessels and aircraft are always entitled to notification. The commander of the blockading forces will usually also notify local authorities in the blockaded area. The form of the notification is not material so long as it is effective.

**7.7.2.3 Effectiveness.** In order to be valid, a blockade must be effective. To be effective, it must be maintained by a surface, air, or subsurface force or other mechanism that is sufficient to render ingress or egress of the blockaded area dangerous. The requirement of effectiveness does not preclude temporary absence of the blockading force, if such absence is due to stress of weather or to some other reason connected with the blockade (e.g., pursuit of a blockade runner). Nor does effectiveness require that every possible avenue of approach to the blockaded area be covered.

**7.7.2.4 Impartiality.** A blockade must be applied impartially to the vessels and aircraft of all nations. Discrimination by the blockading belligerent in favor of or against the vessels and aircraft of particular nations, including those of its own or those of an allied nation, renders the blockade legally invalid.

**7.7.2.5 Limitations.** A blockade must not bar access to or departure from neutral ports and coasts. Neutral nations retain the right to engage in neutral commerce that does not involve trade or communications originating in or destined for the blockaded area.

**7.7.3 Special Entry and Exit Authorization.** Although neutral warships and military aircraft enjoy no positive right of access to blockaded areas, the belligerent imposing the blockade may authorize their entry and exit. Such special authorization may be made subject to such conditions as the blockading force considers to be necessary and expedient. Neutral vessels and aircraft in evident distress should be authorized entry into a blockaded area, and subsequently authorized to depart, under conditions prescribed by the officer in command of the blockading force or responsible for maintenance of the blockading instrumentality (e.g., mines). Similarly, neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded should be authorized to pass through the blockade cordon.

**7.7.4 Breach and Attempted Breach of Blockade.** Breach of blockade is the passage of a vessel or aircraft through a blockade without special entry or exit authorization from the blockading belligerent. Attempted breach of blockade occurs from the time a vessel or aircraft leaves a port or airfield with the intention of evading the blockade, and for vessels exiting the blockaded area, continues until the voyage is completed. Knowledge of the existence of the blockade is essential to the offenses of breach of blockade and attempted breach of blockade. Knowledge may be presumed once a blockade has been declared and appropriate notification provided to affected governments. It is immaterial that the vessel or aircraft is at the time of interception bound for neutral territory, if its ultimate destination is the blockaded area. There is a presumption of attempted breach of blockade where vessels or aircraft are bound for a neutral port or airfield serving as a point of transit to the blockaded area. Capture of such vessels is discussed in paragraph 7.10.

**7.7.5 Contemporary Practice.** The traditional rules of blockade, as set out above, are for the most part customary in nature, having derived their definitive form through the practice of maritime powers during the nineteenth century. The rules reflect a balance between the right of a belligerent possessing effective command of the sea to close enemy ports and coastlines to international commerce, and the right of neutral nations to carry out neutral commerce with the least possible interference from belligerent forces. The law of blockade is, therefore, premised on a system of controls designed to effect only a limited interference with neutral trade. This was traditionally accomplished by a relatively "close-in" cordon of surface warships stationed in the immediate vicinity of the blockaded area.

The increasing emphasis in modern warfare on seeking to isolate completely the enemy from outside



assistance and resources by targeting enemy merchant vessels as well as warships, and on interdicting all neutral commerce with the enemy, is not furthered substantially by blockades established in strict conformity with the traditional rules. In World Wars I and II, belligerents of both sides resorted to methods which, although frequently referred to as measures of blockade, cannot be reconciled with the traditional concept of the close-in blockade. The so-called long-distance blockade of both World Wars departed materially from those traditional rules and were justified instead upon the belligerent right of reprisal against illegal acts of warfare on the part of the enemy. Moreover, recent developments in weapons systems and platforms, particularly submarines, supersonic aircraft, and cruise missiles, have rendered the in-shore blockade exceedingly difficult, if not impossible, to maintain during anything other than a local or limited armed conflict.

Notwithstanding this trend in belligerent practices (during general war) away from the establishment of blockades that conform to the traditional rules, blockade continues to be a useful means to regulate the competing interests of belligerents and neutrals in more limited armed conflict. The experience of the United States during the Vietnam Conflict provides a case in point. The mining of Haiphong and other North Vietnamese ports, accomplished by the emplacement of mines, was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality, although at the time the mining took place the term "blockade" was not used.

## **7.8 BELLIGERENT CONTROL OF THE IMMEDIATE AREA OF NAVAL OPERATIONS**

Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.

**7.8.1 Belligerent Control of Neutral Communications at Sea.** The commanding officer of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations

might otherwise endanger or jeopardize those operations. A neutral merchant ship or civil aircraft within that area that fails to conform to a belligerent's directions concerning communications may thereby assume enemy character and risk being fired upon or captured. Legitimate distress communications should be permitted to the extent that the success of the operation is not prejudiced thereby. Any transmission to an opposing belligerent of information concerning military operations or military forces is inconsistent with the neutral duties of abstention and impartiality and renders the neutral vessel or aircraft liable to capture or destruction.

## **7.9 EXCLUSION ZONES AND WAR ZONES**

Belligerent control of an immediate area of naval operations is to be clearly distinguished from the belligerent practice during World Wars I and II of establishing broad ocean areas as "exclusion zones" or "war zones" in which neutral shipping was either barred or put at special risk. Operational war/exclusion zones established by the belligerents of both sides were based on the right of reprisal against alleged illegal behavior of the enemy and were used to justify the exercise of control over, or capture and destruction of, neutral vessels not otherwise permitted by the rules of naval warfare. Exclusion or war zones established by belligerents in the context of limited warfare that has characterized post-World War II belligerency at sea, have been justified, at least in part, as reasonable, albeit coercive, measures to contain the geographic area of the conflict or to keep neutral shipping at a safe distance from areas of actual or potential hostilities. To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury (see paragraph 8.1.2.1), and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful. However, the establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft which do not constitute lawful targets. In short, an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent.

## **7.10 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT**

Neutral merchant vessels and civil aircraft are liable to capture by belligerent warships and military aircraft if engaged in any of the following activities:

1. Avoiding an attempt to establish identity

2. Resisting visit and search
3. Carrying contraband
4. Breaking or attempting to break blockade
5. Presenting irregular or fraudulent papers; lacking necessary papers; or destroying, defacing, or concealing papers
6. Violating regulations established by a belligerent within the immediate area of naval operations
7. Carrying personnel in the military or public service of the enemy
8. Communicating information in the interest of the enemy.

Captured vessels and aircraft are sent to a port or airfield under belligerent jurisdiction as prize for adjudication by a prize court. Ordinarily, a belligerent warship will place a prize master and prize crew on board a captured vessel for this purpose. Should that be impracticable, the prize may be escorted into port by a belligerent warship or military aircraft. In the latter circumstances, the prize must obey the instructions of its escort or risk forcible measures. (Article 630.23 of OPNAVINST 3120.32 (series), Standard Organization and Regulations of the U.S. Navy, sets forth the duties and responsibilities of commanding officers and prize masters concerning captured vessels.)

Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent warships and military aircraft and assume all risk of resulting damage.

**7.10.1 Destruction of Neutral Prizes.** Every reasonable effort should be made to avoid destruction of captured neutral vessels and aircraft. A capturing officer, therefore, should not order such destruction without being entirely satisfied that the prize can neither be sent into a belligerent port or airfield nor, in his opinion, properly be released. Should it become necessary that the prize be destroyed, the capturing officer must provide for the safety of the passengers and crew. In that event, all documents and papers relating to the prize should be saved. If practicable, the personal effects of passengers should also be safeguarded.

**7.10.2 Personnel of Captured Neutral Vessels and Aircraft.** The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral nation do not become prisoners of war and must be repatriated as soon as circumstances reasonably permit. This rule applies equally to the officers and crews of neutral vessels and aircraft which have assumed the character of enemy merchant vessels or aircraft by operating under enemy control or resisting visit and search. If, however, the neutral vessels or aircraft had taken a direct part in the hostilities on the side of the enemy or had served in any way as a naval or military auxiliary for the enemy, it thereby assumed the character of an enemy warship or military aircraft and, upon capture, its officers and crew may be interned as prisoners of war.

Enemy nationals found on board neutral merchant vessels and civil aircraft as passengers who are actually embodied in the military forces of the enemy, who are en route to serve in the enemy's armed forces, who are employed in the public service of the enemy, or who may be engaged in or suspected of service in the interests of the enemy may be made prisoners of war. All such enemy nationals may be removed from the neutral vessel or aircraft whether or not there is reason for its capture as a neutral prize. Enemy nationals not falling within any of these categories are not subject to capture or detention.

## **7.11 BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL GOVERNMENT**

International law recognizes that neutral territory, being outside the region of war, offers a place of asylum to individual members of belligerent forces and as a general rule requires the neutral government concerned to prevent the return of such persons to their own forces. The neutral nation must accord equal treatment to the personnel of all the belligerent forces.

Belligerent combatants taken on board a neutral warship or military aircraft beyond neutral waters must be interned. Belligerent civilians taken on board a neutral warship or military aircraft in such circumstances are to be repatriated.

With respect to aircrews of non-medical belligerent aircraft that land in neutral territory, whether intentionally or inadvertently, the neutral nation must intern them.

# CHAPTER 8

## The Law of Targeting

### 8.1 PRINCIPLES OF LAWFUL TARGETING

The law of targeting is premised upon the three fundamental principles of the law of armed conflict:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
2. It is prohibited to launch attacks against the civilian population as such.
3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.

These legal principles governing targeting generally parallel the military principles of the objective, mass, and economy of force. The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary collateral destruction must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented. The law of targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war.

**8.1.1 Military Objectives.** Only military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force.

Proper targets for naval attack include such military objectives as enemy warships and military aircraft, naval and military auxiliaries, naval and military bases ashore, warship construction and repair facilities, military depots and warehouses, petroleum/oils/lubricants (POL) storage areas, docks, port facilities, harbors, bridges, airfields, military vehicles, armor, artillery, ammunition stores, troop concentrations and embarkation points, lines of communication and other objects used to conduct or support military operations. Proper naval targets also include geographic targets, such as a mountain pass, and buildings and facilities that provide administrative and personnel support for military and naval operations such as barracks, communications and command and control facilities, headquarters buildings, mess halls, and training areas.

Proper economic targets for naval attack include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.

**8.1.2 Civilians and Civilian Objects.** Civilians and civilian objects may not be made the object of attack. Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability. Attacks on installations such as dikes and dams are prohibited if their breach or destruction would result in the loss of civilian lives disproportionate to the military advantage to be gained. (See also paragraph 8.5.1.7.) Similarly, the intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use, is prohibited.

**8.1.2.1 Incidental Injury and Collateral Damage.** It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack

upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack. In making this determination, "military advantage" refers to the advantage anticipated from the military operation of which the attack is a part, taken as a whole, and not from isolated or particular parts of that operation. Naval commanders must take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force. In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him. Similarly, the commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.

**8.1.3 Environmental Considerations.** It is not unlawful to cause collateral damage to the natural environment during an attack upon a legitimate military objective. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment. To that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited. Therefore, a commander should consider the environmental damage which will result from an attack on a legitimate military objective as one of the factors during targeting analysis.

## **8.2 SURFACE WARFARE**

As a general rule, surface warships may employ their conventional weapons systems to attack enemy surface, subsurface, and air targets wherever located beyond neutral territory. (Special circumstances in which enemy warships and military aircraft may be attacked in neutral territory are discussed in Chapter 7.) The law of armed conflict pertaining to surface warfare is concerned primarily with the protection of noncombatants through rules establishing lawful targets of attack. For that purpose, all enemy vessels and aircraft fall into one of three general classes, i.e., warships and military aircraft, merchant vessels and civilian aircraft, and exempt vessels and aircraft.

### **8.2.1 Enemy Warships and Military Aircraft.**

Enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory. It is forbidden, however, to target an enemy warship or military aircraft that in good faith clearly conveys a timely offer of surrender. Once an enemy warship has clearly indicated a readiness to surrender by hauling down her flag, by hoisting a white flag, by surfacing (in the case of submarines), by stopping engines and responding to the attacker's signals, or by taking to lifeboats, the attack must be discontinued. Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected. Officers and crews of captured or destroyed enemy warships, military aircraft, and naval and military auxiliaries should be made prisoners of war. (See Chapter 11 for further discussion of surrender and prisoners of war.) As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead.

Prize procedure is not used for captured enemy warships and naval auxiliaries because their ownership vests immediately in the captor's government by the fact of capture.

### **8.2.2 Enemy Merchant Vessels and Civil Aircraft**

**8.2.2.1 Capture.** Enemy merchant vessels and civil aircraft may be captured wherever located beyond neutral territory. Prior exercise of visit and search is not required, provided positive determination of enemy status can be made by other means. When military circumstances preclude sending or taking in such vessel or aircraft for adjudication as an enemy prize, it may be destroyed after all possible measures are taken to provide for the safety of passengers and crew. Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should be saved. Every case of destruction of a captured enemy prize should be reported promptly to higher command.

Officers and crews of captured enemy merchant ships and civilian aircraft may be made prisoners of war. Other enemy nationals on board such captured ships and aircraft as private passengers are subject to

the discipline of the captor. Nationals of a neutral nation on board captured enemy merchant vessels and civilian aircraft are not made prisoners of war unless they have participated in acts of hostility or resistance against the captor or are otherwise in the service of the enemy.

**8.2.2.2 Destruction.** Prior to World War II, both customary and conventional international law prohibited the destruction of enemy merchant vessels by surface warships unless the safety of passengers and crew was first assured. This requirement did not apply, however, if the merchant vessel engaged in active resistance to capture or refused to stop when ordered to do so. Specifically, the London Protocol of 1936, to which almost all of the belligerents of World War II expressly acceded, provides in part that:

*In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.*

During World War II, the practice of attacking and sinking enemy merchant vessels by surface warships and submarines without prior warning and without first providing for the safety of passengers and crew was widespread on both sides. Rationale for these apparent departures from the agreed rules of the 1936 London Protocol varied. Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant vessels were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy's war-fighting/war-sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.

Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice of belligerents that evolved during and fol-

lowing World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:

1. Persistently refusing to stop upon being duly summoned to do so
2. Actively resisting visit and search or capture
3. Sailing under convoy of enemy warships or enemy military aircraft
4. If armed
5. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces
6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces
7. If integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

Rules relating to surrendering and to the search for and collection of the shipwrecked, wounded, and sick and the recovery of the dead, set forth in paragraph 8.2.1, apply also to enemy merchant vessels and civilian aircraft that may become subject to attack and destruction.

**8.2.3 Enemy Vessels and Aircraft Exempt From Destruction or Capture.** Certain classes of enemy vessels and aircraft are exempt under the law of naval warfare from capture or destruction provided they are innocently employed in their exempt category. These specially protected vessels and aircraft must not take part in the hostilities, must not hamper the movement of combatants, must submit to identification and inspection procedures, and may be ordered out of harm's way. These specifically exempt vessels and aircraft include:

1. Vessels and aircraft designated for and engaged in the exchange of prisoners of war (cartel vessels or aircraft).
2. Properly designated and marked hospital ships, medical transports, and medical aircraft. Names and descriptions of hospital ships must be provided to the parties to the conflict not later than ten days before they are first employed. Thereafter, hospital ships must be used exclusively

to assist, treat and transport the wounded, sick and shipwrecked. All exterior surfaces of hospital ships are painted white and the distinctive emblem of the Red Cross or Red Crescent is displayed on the hull and on horizontal surfaces. Hospital ships may not be armed although crew members may carry light individual weapons for the maintenance of order, for their own defense and that of the wounded, sick and shipwrecked. Use or possession of cryptographic means of transmitting message traffic by hospital ships is prohibited under current law. Medical aircraft, whether civilian or military, and whether permanently or temporarily so employed, must be used exclusively for the removal and transportation of the wounded, sick and shipwrecked, or for the transportation of medical personnel or medical equipment. They may not be armed nor may they be reconnaissance configured. Medical aircraft must be clearly marked with the emblem of the red cross or red crescent. Hospital ships, medical transports and medical aircraft utilized solely for medical purposes and recognized as such are not to be deliberately attacked.

3. Vessels charged with religious, non-military scientific, or philanthropic missions. (Vessels engaged in the collection of scientific data of potential military application are not exempt.)
4. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.
5. Small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade. Such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area.
6. Civilian passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.

If an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or

destroyed. Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction. All nations have a legal obligation not to take advantage of the harmless character of exempt vessels and aircraft in order to use them for military purposes while preserving their innocent appearance. For example, the utilization by North Vietnam of innocent appearing small coastal fishing boats as logistic craft in support of military operations during the Vietnam Conflict was in violation of this obligation.

### 8.3 SUBMARINE WARFARE

The law of armed conflict imposes essentially the same rules on submarines as apply to surface warships. Submarines may employ their conventional weapons systems to attack enemy surface, subsurface or airborne targets wherever located beyond neutral territory. Enemy warships and military aircraft, including naval and military auxiliaries, may be attacked and destroyed without warning. Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have indicated clearly their intention to do so, apply as well to submarines. To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick following an engagement. If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.

**8.3.1 Interdiction of Enemy Merchant Shipping by Submarines.** The rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine's effectiveness as a weapons system is dependent upon its capability to remain submerged (and thereby undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 (paragraph 8.2.2.2) makes no distinction between submarines and surface warships with respect to attacks upon enemy merchant shipping. The London Protocol specifies that except in case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship "whether surface vessel or submarine" may not destroy an enemy merchant vessel "without having first placed passengers, crew and ship's papers in a place of safety." The impracticality of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and

destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as a reprisal in response to unlawful acts of the enemy or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy's war-fighting/war-sustaining effort.

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel unless:

1. The enemy merchant vessel persistently refuses to stop when duly summoned to do so
2. It actively resists visit and search or capture
3. It is sailing under convoy of enemy warships or enemy military aircraft
4. It is armed
5. It is incorporated into, or is assisting in any way the enemy's military intelligence system
6. It is acting in any capacity as a naval or military auxiliary to an enemy's armed forces
7. The enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with the London Protocol of 1936 would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

**8.3.2 Enemy Vessels and Aircraft Exempt From Submarine Interdiction.** The rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships also apply to submarines. (See paragraph 8.2.3.)

## **8.4 AIR WARFARE AT SEA**

Military aircraft may employ conventional weapons systems to attack warships and military aircraft, including naval and military auxiliaries, anywhere beyond neutral territory. Enemy merchant vessels and civil aircraft may be attacked and destroyed by military aircraft only under the following circumstances:

1. When persistently refusing to comply with directions from the intercepting aircraft
2. When sailing under convoy of enemy warships or military aircraft
3. When armed
4. When incorporated into or assisting in any way the enemy's military intelligence system
5. When acting in any capacity as a naval or military auxiliary to an enemy's armed forces
6. When otherwise integrated into the enemy's war-fighting or war-sustaining effort.

To the extent that military exigencies permit, military aircraft are required to search for the shipwrecked, wounded, and sick following an engagement at sea. The location of possible survivors should be passed at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance.

Historically, instances of surrender of enemy vessels to aircraft are rare. If, however, an enemy has surrendered in good faith, under circumstances that do not preclude enforcement of the surrender, or has clearly indicated an intention to do so, the enemy must not be attacked.

**8.4.1 Enemy Vessels and Aircraft Exempt From Aircraft Interdiction.** The rules of naval warfare regarding enemy vessels and aircraft that are exempt from capture and/or destruction by surface warships also apply to military aircraft. (See paragraph 8.2.3.)

## **8.5 BOMBARDMENT**

For purposes of this publication, the term "bombardment" refers to naval and air bombardment of enemy targets on land with conventional weapons, including naval guns, rockets and missiles, and air-delivered ordnance. Land warfare is discussed in paragraph 8.6. Engagement of targets at sea is discussed in paragraphs 8.2 to 8.4.

**8.5.1 General Rules.** The United States is a party to Hague Convention No. IX (1907) Respecting Bombardment by Naval Forces in Time of War. That convention establishes the general rules of naval bombardment of land targets. These rules have been further developed by customary practice in World Wars I and II, Vietnam, the Falkland/Malvinas Conflict, and the Persian Gulf. Underlying these rules are the broad principles of the law

of armed conflict that belligerents are forbidden to make noncombatants the target of direct attack, that superfluous injury and unnecessary suffering are to be avoided, and that wanton destruction of property is prohibited. To give effect to these concepts of humanitarian law, the following general rules governing bombardment must be observed.

**8.5.1.1 Destruction of Civilian Habitation.** The wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited. A military objective within a city, town, or village may, however, be bombarded if required for the submission of the enemy with the minimum expenditure of time, life, and physical resources. Incidental injury to civilians, or collateral damage to civilian objects must not be excessive in light of the military advantage anticipated by the attack. (See Paragraph 8.1.2.1.)

**8.5.1.2 Terrorization.** Bombardment for the sole purpose of terrorizing the civilian population is prohibited.

**8.5.1.3 Undefended Cities or Agreed Demilitarized Zones.** Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition, neither undefended nor open, and military targets therein may be destroyed by bombardment. An agreed demilitarized zone is also exempt from bombardment.

**8.5.1.4 Medical Facilities.** Medical establishments and units (both mobile and fixed), medical vehicles, and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such a manner that attacks against military targets in the vicinity do not imperil their safety. If medical facilities are used for military purposes inconsistent with their humanitarian mission, and if appropriate warnings that continuation of such use will result in loss of protected status are unheeded, the facilities become subject to attack. The distinctive medical emblem, a red cross or red crescent, is to be clearly displayed on medical establishments and units in order to identify them as entitled to protected status. Any object recognized as being a medical facility may not be attacked whether or not marked with a protective symbol.

**8.5.1.5 Special Hospital Zones and Neutralized Zones.** When established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned.

**8.5.1.6 Religious, Cultural, and Charitable Buildings and Monuments.** Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be bombarded, provided they are not used for military purposes. It is the responsibility of the local inhabitants to ensure that such buildings and monuments are clearly marked with the distinctive emblem of such sites--a rectangle divided diagonally into two triangular halves, the upper portion black and the lower white. (See paragraph 11.9.3.)

**8.5.1.7 Dams and Dikes.** Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment. Conversely, installations containing such dangerous forces that are used by belligerents to shield or support military activities are not so protected.

**8.5.2 Warning Before Bombardment.** Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy.

## **8.6 LAND WARFARE**

The guidance in this paragraph provides an overview of the basic principles of law governing conflict on land. For a comprehensive treatment of the law of armed conflict applicable to land warfare see FMFM 0-25 "Department of the Army Field Manual FM 27-10, The Law of Land Warfare."

**8.6.1 Targeting in Land Warfare.** Only combatants and other military objectives may be attacked (see paragraph 8.1.1). Noncombatants and civilian objects may not be objects of attack. Incidental injury to noncombatants and collateral damage to civilian objects incurred during an attack upon a legitimate military objective must not be excessive in relation to the military advantage to be achieved by the attack (see paragraph 8.1.2.1). When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity (see paragraph 11.2).

**8.6.2 Special Protection.** Under the law of land warfare, certain persons, places and objects enjoy special protection against attack. Protection is, of necessity, dependent upon recognition of protected



status and special signs and symbols are employed for that purpose (see paragraph 11.9). Failure to display protective signs and symbols does not render an otherwise protected person, place or object a legitimate target if that status is otherwise apparent (see paragraph 11.9.6). However, protected persons participating directly in hostilities lose their protected status and may be attacked while so employed. Similarly, misuse of protected places and objects for military purposes renders them subject to legitimate attack during the period of misuse.

**8.6.2.1 Protected Persons.** Protected persons include the wounded, sick, and shipwrecked (see paragraph 11.4), certain parachutists (see paragraph 11.6), and prisoners of war (see paragraph 11.7). Civilians and other noncombatants, such as medical personnel and

chaplains (see paragraph 11.5), and interned persons (see paragraph 11.8) also enjoy protected status.

**8.6.2.2 Protected Places and Objects.** Protected places include undefended cities and towns and agreed demilitarized zones (see paragraph 8.5.1.3), and agreed special hospital zones and neutralized zones (see paragraph 8.5.1.5). Protected objects include historic monuments and structures, works of art, medical facilities and religious, cultural, and charitable buildings and monuments (see paragraph 8.5.1.6).

**8.6.2.3 The Environment.** A discussion of environmental considerations during armed conflict is contained in paragraph 8.1.3. The use of herbicidal agents is addressed in paragraph 10.3.3.



# CHAPTER 9

## Conventional Weapons and Weapons Systems

### 9.1 INTRODUCTION

This chapter addresses the legal considerations pertaining to the use of conventional weapons and weapons systems. It is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited. This rule of law is expressed in the concept that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited. A corollary concept is that weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect. A few weapons, such as poisoned projectiles, are unlawful, no matter how employed. Others may be rendered unlawful by alteration, such as by coating ammunition with a poison. Still others may be unlawfully employed, such as by setting armed contact naval mines adrift so as to endanger innocent as well as enemy shipping. And finally, any weapon may be set to an unlawful purpose when it is directed against noncombatants and other protected persons and property. (See Chapter 11 — Noncombatant Persons.)

Of particular interest to naval officers are law of armed conflict rules pertaining to naval mines, land mines, torpedoes, cluster and fragmentation weapons, delayed action devices, incendiary weapons, directed energy devices and over-the-horizon weapons systems. Each of these weapons or systems will be assessed in terms of its potential for causing unnecessary suffering and superfluous injury or indiscriminate effect.

**9.1.1 Unnecessary Suffering.** Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons that are designed to

cause unnecessary suffering or superfluous injury are, however, prohibited because the degree of pain or injury, or the certainty of death they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use. Poisoned projectiles and small arms ammunition intended to cause superfluous injury or unnecessary suffering fall into this category. Similarly, using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds. Use of such materials as incidental components in ammunition, e.g., as wadding or packing, is not prohibited. Use of .50 caliber weapons against individual enemy combatants does not constitute a violation of this proscription against unnecessary suffering or superfluous injury.

**9.1.2 Indiscriminate Effect.** Weapons that are incapable of being controlled (i.e., directed at a military target) are forbidden as being indiscriminate in their effect. Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloon-borne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II lack that capability of direction and are, therefore, unlawful.

### 9.2 NAVAL MINES

Naval mines have been effectively employed for area denial, coastal and harbor defense, antisurface

and antisubmarine warfare, and blockade. Naval mines are lawful weapons, but their potential for indiscriminate effects has led to specific regulation of their deployment and employment by the law of armed conflict. The extensive and uncontrolled use of naval mines by both sides in the Russo-Japanese War of 1904-5 inflicted great damage on innocent shipping both during and long after that conflict, and led to Hague Convention No. VIII of 1907 Relative to the Laying of Automatic Submarine Contact Mines. The purpose of the Hague rules is to ensure, to the extent practicable, the safety of innocent shipping. These rules require that naval mines be so constructed as to become harmless should they break loose from their moorings or otherwise cease to be under the affirmative control of the belligerents that laid them. The Hague rules also require that shipowners be warned of the presence of mines as soon as military exigencies permit.

Although the Hague provisions date from 1907, they remain the only codified rules specifically addressing the emplacement of conventional naval mines. Technological developments have created weapons systems obviously not contemplated by the drafters of these rules. Nonetheless, the general principles of law embodied in the 1907 Convention continue to serve as a guide to lawful employment of naval mines.

**9.2.1 Current Technology.** Modern naval mines are versatile and variable weapons. They range from relatively unsophisticated and indiscriminate contact mines to highly technical, target-selective devices with state-of-the-art homing guidance capability. Today's mines may be armed and/or detonated by physical contact, acoustic or magnetic signature, or sensitivity to changes in water pressure generated by passing vessels and may be emplaced by air, surface, or subsurface platforms. For purposes of this publication, naval mines are classified as armed or controlled mines. Armed mines are either emplaced with all safety devices withdrawn, or are armed following emplacement, so as to detonate when pre-set parameters (if any) are satisfied. Controlled mines have no destructive capability until affirmatively activated by some form of arming order (whereupon they become armed mines).

**9.2.2 Peacetime Mining.** Consistent with the safety of its own citizenry, a nation may emplace both armed and controlled mines in its own internal waters at any time with or without notification. A nation may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate in-

ternational notification of the existence and location of such mines is required. Because the right of innocent passage can be suspended only temporarily, armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has terminated. Armed mines may not be emplaced in international straits or archipelagic sea lanes during peacetime. Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.

Naval mines may not be emplaced in internal waters, territorial seas, or archipelagic waters of another nation in peacetime without that nation's consent. Controlled mines may, however, be emplaced in international waters (i.e., beyond the territorial sea) if they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an "unreasonable interference" involves a balancing of a number of factors, including the rationale for their emplacement (i.e., the self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controlled mines do not constitute a hazard to navigation, international notice of their emplacement is not required.

Armed mines may not be emplaced in international waters prior to the outbreak of armed conflict, except under the most demanding requirements of individual or collective self-defense. Should armed mines be emplaced in international waters under such circumstances, prior notification of their location must be provided. A nation emplacing armed mines in international waters during peacetime must maintain an on-scene presence in the area sufficient to ensure that appropriate warning is provided to ships approaching the danger area. All armed mines must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.

**9.2.3 Mining During Armed Conflict.** Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:

1. International notification of the location of emplaced mines must be made as soon as military exigencies permit.
2. Mines may not be emplaced by belligerents in neutral waters.
3. Anchored mines must become harmless as soon as they have broken their moorings.

4. Unanchored mines not otherwise affixed or imbedded in the bottom must become harmless within an hour after loss of control over them.
5. The location of minefields must be carefully recorded to ensure accurate notification and facilitate subsequent removal and/or deactivation.
6. Naval mines may be employed to channelize neutral shipping, but not in a manner to deny transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping.
7. Naval mines may not be emplaced off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping, but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways.
8. Mining of areas of indefinite extent in international waters is prohibited. Reasonably limited barred areas may be established by naval mines, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

### 9.3 LAND MINES

Land mines are munitions placed on, under, or near the ground or other surface area and designed to be detonated or exploded by the passage of time; the presence, proximity or contact of a person or vehicle; or upon command. As with all weapons, to be lawful, land mines must be directed at military objectives. The controlled nature of command detonated land mines provides effective target discrimination. In the case of non-command detonated land mines, however, there exists potential for indiscriminate injury to noncombatants. Accordingly, special care must be taken when employing land mines to ensure noncombatants are not indiscriminately injured. International law requires that, to the extent possible, belligerents record the location of all minefields in order to facilitate their removal upon the cessation of hostilities. It is the practice of the United States to record the location of minefields in all circumstances.

### 9.4 TORPEDOES

Torpedoes which do not become harmless when they have missed their mark constitute a danger to innocent shipping and are therefore unlawful. All U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run.

## 9.5 CLUSTER AND FRAGMENTATION WEAPONS

Cluster and fragmentation weapons are projectiles, bombs, missiles, submunitions, and grenades that are designed to fragment upon detonation, thereby expanding the radius of their lethality and destructiveness. These weapons are lawful when used against combatants. When used in proximity to non-combatants or civilian objects, their employment should be carefully monitored to ensure that collateral damage and incidental injury is not excessive in relation to the legitimate military advantage sought.

## 9.6 BOOBY TRAPS AND OTHER DELAYED ACTION DEVICES

Booby traps and other delayed action devices are not unlawful, provided they are not designed to cause unnecessary suffering or employed in an indiscriminate manner. Devices that are designed to simulate items likely to attract and injure noncombatants (e.g., toys and trinkets) are prohibited. Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited. Belligerents are required to record the location of booby traps and other delayed action devices in the same manner as land mines (see paragraph 9.3).

## 9.7 INCENDIARY WEAPONS

Incendiary devices, such as tracer ammunition, thermite bombs, flame throwers, napalm, and other incendiary weapons and agents, are lawful weapons. Where incendiary devices are the weapons of choice, they should be employed in a manner that does not cause incidental injury or collateral damage that is excessive in light of the military advantage anticipated by the attack.

## 9.8 DIRECTED ENERGY DEVICES

Directed energy devices, which include laser, high-powered microwave, and particle beam devices, are not proscribed by the law of armed conflict. Lasers may be employed as a rangefinder or for target acquisition, with the possibility of ancillary injury to enemy personnel, ~~or directly against combatants as an antipersonnel weapon. Their use does not violate the prohibition against the infliction of unnecessary suffering.~~ As a matter of policy, U.S. military forces will not employ laser weapons specifically designed to cause permanent blindness.

## **9.9 OVER-THE-HORIZON WEAPONS SYSTEMS**

Missiles and projectiles with over-the-horizon or beyond-visual-range capabilities are lawful, pro-

vided they are equipped with sensors, or are employed in conjunction with external sources of targeting data, that are sufficient to ensure effective target discrimination.

## CHAPTER 10

# Nuclear, Chemical, and Biological Weapons

### 10.1 INTRODUCTION

Nuclear, chemical, and biological weapons present special law of armed conflict problems due to their potential for indiscriminate effect. This chapter addresses legal considerations pertaining to the development, possession, deployment and employment of these weapons.

### 10.2 NUCLEAR WEAPONS

**10.2.1 General.** There are no rules of customary or conventional international law prohibiting nations from employing nuclear weapons in armed conflict. In the absence of such an express prohibition, the use of nuclear weapons against enemy combatants and other military objectives is not unlawful. Employment of nuclear weapons is, however, subject to the following principles: the right of the parties to the conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian population as such; and distinction must be made at all times between combatants and noncombatants to the effect that the latter be spared as much as possible. Given their destructive potential, the decision to authorize employment of nuclear weapons should emanate from the highest level of government. For the United States, that authority resides solely in the President.

**10.2.2 Treaty Obligations.** Nuclear weapons are regulated by a number of arms control agreements restricting their development, possession, deployment, and use. Some of these agreements (e.g., the 1963 Nuclear Test Ban Treaty) may not apply during time of war.

**10.2.2.1 Seabed Arms Control Treaty.** This multilateral convention prohibits emplacement of nuclear weapons on the seabed and the ocean floor beyond 12 nautical miles from the baseline from which the territorial sea is measured. The prohibition extends to structures, launching installations, and other facilities specifically designed for storing, testing, or using nuclear weapons. This treaty prohibits emplacement of nuclear mines on the seabed and ocean floor or in the subsoil thereof. It does not, however, prohibit the use of

nuclear weapons in the water column, provided they are not affixed to the seabed (e.g., nuclear armed depth charges and torpedoes).

**10.2.2.2 Outer Space Treaty.** This multilateral convention prohibits the placement in earth orbit, installation on the moon and other celestial bodies, and stationing in outer space in any other manner, of nuclear and other weapons of mass destruction. Suborbital missile systems are not included in this prohibition.

**10.2.2.3 Antarctic Treaty.** The Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60 South Latitude, is used for peaceful purposes only. The treaty prohibits in Antarctica "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons." Nuclear explosions are specifically prohibited. Ships and aircraft at points of discharging or embarking personnel or cargoes in Antarctica are subject to international inspection. Ships operating on and under, and aircraft operating over the high seas within the treaty area are not subject to these prohibitions.

**10.2.2.4 Treaty of Tlatelolco.** This treaty is an agreement among the Latin American countries not to introduce nuclear weapons into Latin America. The treaty does not, however, prohibit Latin American nations from authorizing nuclear-armed ships and aircraft of non-member nations to visit their ports and airfields or to transit through their territorial sea or airspace. The treaty is not applicable to the means of propulsion of any vessel.

Protocol I to the treaty is an agreement among non-Latin American nations that exercise international responsibility over territory within the treaty area to abide by the denuclearization provisions of the treaty. France, the Netherlands, the U.K., and the U.S. are parties to Protocol I. For purposes of this treaty, U.S. controlled territory in Latin America includes Guantanamo Bay in Cuba, the Virgin Islands, and

Puerto Rico. Consequently the U.S. cannot maintain nuclear weapons in those areas. Protocol I nations retain, however, competence to authorize transits and port visits by ships and aircraft of their own or other armed forces in their Protocol I territories, irrespective of armament, cargo, or means of propulsion.

Protocol II is an agreement among nuclear-armed nations (China, France, Russia, the U.K., and the U.S.) to respect the denuclearization aims of the treaty, to not use nuclear weapons against Latin American nations party to the treaty, and to refrain from contributing to a violation of the treaty by Latin American nations.

**10.2.2.5 Nuclear Test Ban Treaty.** This multilateral treaty prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 nations are party to the treaty, including Russia, the U.K., and the U.S. (France and China are not parties.) Underground testing of nuclear weapons is not included within the ban.

**10.2.2.6 Non-Proliferation Treaty.** This multilateral treaty obligates nuclear-weapons-nations to refrain from transferring nuclear weapons or nuclear weapons technology to non-nuclear-weapons nations, and obligates non-nuclear-weapons-nations to refrain from accepting such weapons from nuclear-weapons-nations or from manufacturing nuclear weapons themselves. The treaty does not apply in time of war.

**10.2.2.7 Bilateral Nuclear Arms Control Agreements.** The United States and Russia (as the successor state to the U.S.S.R.) are parties to a number of bilateral agreements designed to either restrain the growth or reduce the number of nuclear warheads and launchers and to reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are the Hotline Agreements of 1963 and 1971, the Accidents Measures Agreement of 1971, the 1973 Agreement on Prevention of Nuclear War, the Anti-Ballistic Missile Treaty of 1972 and its Protocol of 1974, the Threshold Test Ban Treaty of 1974, the 1976 Treaty on Peaceful Nuclear Explosions, the SALT Agreements of 1972 and 1977 (SALT I Interim Agreement has expired; SALT II was never ratified), the INF Treaty of 1988, and the START treaties of 1991 (START I) and 1993 (START II). The START treaties have initiated the process of physical destruction of strategic nuclear warheads and launchers by the U.S., Russia, Ukraine, Belarus and Kazakhstan (the latter four being recognized as successor states to the U.S.S.R. for this purpose).

## 10.3 CHEMICAL WEAPONS

International law prohibits the use of chemical weapons in armed conflict.

**10.3.1 Treaty Obligations.** The 1925 Geneva Gas Protocol for the Prohibition of the use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("the 1925 Gas Protocol") is the principal international agreement in force relating to the regulation of chemical weapons in armed conflict. The far more comprehensive 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the "1993 Chemical Weapons Convention") will enter into force for those nations party to it in the near future.

**10.3.1.1 The 1925 Gas Protocol.** The United States is a party to the 1925 Gas Protocol, as are all other NATO nations and all former Warsaw Pact nations. The United States, the U.S.S.R., and most other NATO and Warsaw Pact nations conditioned their adherence to the 1925 Gas Protocol on the understanding that the prohibition against use of chemical weapons ceases to be binding with respect to nations whose armed forces, or the armed forces of their allies, fail to respect that prohibition. This, in effect, restricted the prohibition to the "first use" of such munitions, with parties to the Protocol reserving the right to employ chemical weapons for retaliatory purposes.

The 1925 Gas Protocol does not prohibit the development, production, testing, or stockpiling of chemical weapons, nor does it prevent equipping and training military forces for chemical warfare. The United States considers the Protocol to be applicable to lethal and incapacitating agents but not to riot control agents (see paragraph 10.3.2) or herbicidal agents (see paragraph 10.3.3).

The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol. Lethal chemical agents are those asphyxiating, poisonous, or other gases; analogous liquids; or materials that cause immediate death. Incapacitating agents are those producing symptoms that persist for appreciable periods of time after exposure to the agent has terminated. Consistent with its first-use reservation to the 1925 Gas Protocol, the United States maintained a lethal and incapacitating chemical weapons capability for deterrence and possible retaliatory purposes only. National Command Authorities (NCA) approval was required for retaliatory use of lethal or incapacitating chemical weapons by U.S. Forces.



Retaliatory use of lethal or incapacitating chemical agents was to be terminated as soon as the enemy use of such agents that prompted the retaliation had ceased and any tactical advantage gained by the enemy through unlawful first use had been redressed. Upon coming into force of the 1993 Chemical Weapons Convention, any use of chemical weapons by a party to that convention, whether or not in retaliation against unlawful first use by another nation, will be prohibited. (See paragraph 10.3.1.2).

**10.3.1.2 The 1993 Chemical Weapons Convention.** This comprehensive Convention will, upon entry into force, prohibit the development, production, stockpiling and use of chemical weapons, and mandate the destruction of chemical weapons and chemical weapons production facilities for all nations that are party to it. The Convention specifically prohibits the use of riot control agents as a "method of warfare." It does not, however, modify existing international law with respect to herbicidal agents.

The United States signed the 1993 Chemical Weapons Convention on 13 January 1993. The President transmitted the Convention to the Senate on 23 November 1993 for its advice and consent to ratification.

**10.3.2 Riot Control Agents.** Riot control agents are those gases, liquids and analogous substances that are widely used by governments for civil law enforcement purposes. Riot control agents, in all but the most unusual circumstances, cause merely transient effects that disappear within minutes after exposure to the agent has terminated. Tear gas and Mace are examples of riot control agents in widespread use by law enforcement officials.

#### **10.3.2.1 Riot Control Agents in Armed Conflict**

**10.3.2.1.1 Under the 1925 Gas Protocol.** The United States considers that use of riot control agents in armed conflict was not prohibited by the 1925 Gas Protocol. However, the United States formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Uses of riot control agents in time of armed conflict which the United States considers not to be violative of the 1925 Gas Protocol include:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war.
2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.

3. Rescue missions involving downed aircrews or escaping prisoners of war.
4. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of riot control agents by U.S. forces in armed conflict required NCA approval.

**10.3.2.1.2 Under the 1993 Chemical Weapons Convention.** Use of riot control agents as a "method of warfare" is prohibited by the 1993 Chemical Weapons Convention. However, that term is not defined by the Convention. The United States considers that this prohibition applies in international as well as internal armed conflict but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue operations conducted outside of such conflicts.

The United States also considers that it is permissible to use riot control agents against other than combatants in areas under direct U.S. military control, including to control rioting prisoners of war and to protect convoys from civil disturbances, terrorists and paramilitary organizations in rear areas outside the zone of immediate combat.

**10.3.2.2 Riot Control Agents in Time of Peace.** Employment of riot control agents in peacetime is not proscribed by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention and may be authorized by the Secretary of Defense, or in limited circumstances, by the commanders of the combatant commands. Circumstances in which riot control agents may be authorized for employment in peacetime include:

1. Civil disturbances in the United States, its territories and possessions.
2. Protection and security on U.S. bases, posts, embassy grounds, and installations overseas, including for riot control purposes.
3. Law enforcement
  - a. On-base and off-base in the United States, its territories and possessions;
  - b. On-base overseas;
  - c. Off-base overseas when specifically authorized by the host government.

4. Noncombatant evacuation operations involving U.S. or foreign nationals.

**10.3.3 Herbicidal Agents.** Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or to kill long grasses and other vegetation that could shield the movement of enemy forces. The United States considers that use of herbicidal agents in wartime is not prohibited by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention but has formally renounced the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires NCA approval. Use of herbicidal agents in peacetime may be authorized by the Secretary of Defense or, in limited circumstances, by commanders of the combatant commands.

## **10.4 BIOLOGICAL WEAPONS**

International law prohibits all biological weapons or methods of warfare whether directed against persons, animals, or plant life. Biological weapons include microbial or other biological agents or toxins whatever their origin (i.e., natural or artificial) or methods of production.

**10.4.1 Treaty Obligations.** The 1925 Gas Protocol prohibits the use in armed conflict of biological weapons. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacterio-

logical (Biological) and Toxin Weapons and on their Destruction (the "1972 Biological Weapons Convention") prohibits the production, testing, and stockpiling of biological weapons. The Convention obligates nations that are a party thereto not to develop, produce, stockpile, or acquire biological agents or toxins "of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes," as well as "weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict." All such materials were to be destroyed by 26 December 1975. The United States, Russia, and most other NATO and former Warsaw Pact nations are parties to both the 1925 Gas Protocol and the 1972 Biological Weapons Convention.

**10.4.2 United States Policy Regarding Biological Weapons.** The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention.

The United States has, therefore, formally renounced the use of biological weapons under any circumstance. Pursuant to its treaty obligations, the United States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.